

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES COCHENOUR

Claimant

VS.

FAIRVIEW MILLS, INC.

CJ FOODS

Respondents

AND

WAUSAU BUSINESS INSURANCE COMPANY

LIBERTY MUTUAL INSURANCE COMPANY

GENERAL CASUALTY INSURANCE COMPANY

Insurance Carriers

Docket Nos. 1,056,452
1,051,269 & 1,051,270

ORDER

Respondent, Fairview Mills, Inc. and its insurance carrier Wausau Business Insurance Company, request review of the July 13, 2012, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders.

APPEARANCES

John J. Bryan, of Topeka, Kansas, appears for the claimant. Heather A. Howard, of Overland Park, Kansas appears for respondent CJ Foods and its insurance carrier Liberty Mutual Insurance Company (Liberty Mutual). Timothy G. Lutz, of Overland Park, Kansas, appears for respondent CJ Foods and its insurance carrier General Casualty Insurance Company (General Casualty). Karl L. Wenger, of Kansas City, Kansas, appears for respondent Fairview Mills, Inc. and its insurance carrier Wausau Business Insurance Company (Wausau).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations considered by the ALJ, consisting of the transcript of Preliminary Hearing held on August 4, 2010, with attached exhibits; the Evidentiary Deposition of James Cochenour, taken on August 24,

2011, with attached exhibits; the transcript of Preliminary Hearing held on November 1, 2011; and the transcript of Preliminary Hearing held on July 11, 2012, with attached exhibits.

ISSUES

The Administrative Law Judge (ALJ) found claimant was entitled to medical care and appointed Dr. Bradley Poole as the treating physician. The ALJ went on to find that claimant's need for left shoulder surgery is due to his work activities at Fairview Mills, (Docket No. 1,056,452) and that those work activities are competent to cause claimant's current left shoulder condition. Therefore, Fairview Mills and its carrier Wausau were found responsible for the medical care for claimant's left shoulder injuries.

Fairview Mills and its insurance carrier Wausau request review of whether the alleged injuries arose out of and in the course of claimant's employment, and whether the ALJ exceeded her jurisdiction in granting benefits. Fairview Mills argues that the ALJ's Order should be reversed as claimant's current left shoulder injuries are a natural and probable consequence of an accident or accidents that occurred while claimant was employed at CJ Foods and those recurrent problems never fully healed.

CJ Foods and its insurance carriers Liberty Mutual (Docket No. 1,051,269) and General Casualty (Docket No. 1,051,270) argue claimant's current left shoulder problems were caused by a new series of accidents and injuries while claimant was employed with Fairview Mills. Therefore, the ALJ's Order should be affirmed.

Claimant argues that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for CJ Foods on March 13, 2008. He was hired to work in the company's upper warehouse operating a forklift. Claimant testified that he was moved around a lot to perform different jobs and on the day he was injured he was hanging totes. Claimant had only been on the job with respondent for four days when he was injured.

Claimant suffered an injury on March 20, 2008, (Docket # 1,051,269) when he slipped and fell, landing on his shoulders and back on a pallet. Claimant described this accident as occurring as he was climbing on some scaffolding, when his feet slipped out from underneath him. He grabbed a rod to catch himself, temporarily hanging with his left arm and then dropped down onto a pallet, landing on his shoulders and neck. The

scaffolding that claimant fell from was four to five feet off the ground. Claimant testified that all of his weight was on his left shoulder as he hung. Claimant thought he must have been in shock because, after the fall, he got up and went back to work. Claimant reported the accident the next day to his supervisor, John Lyons. A guy named T.J. witnessed the accident.

A few days later claimant was still hurting and reported the injury to respondent's human resources department. An accident report was filled out and claimant was sent for medical treatment. Claimant ultimately came under the care of Richard E. Polly, M.D. of the Kansas Orthopedics & Sports Medicine. At some point, an MRI and x-ray of the neck were ordered. Claimant had the MRI on April 8, 2008, and was returned to light duty. Claimant continued to work through July 2008, performing heavy physical labor after his injury. Claimant received a cortisone injection in his left shoulder and an MRI was ordered of the right shoulder. Claimant was told that the MRI didn't show anything. He was released from treatment with Dr. Polly on June 24, 2008, and returned to full duty.

After claimant returned to work, he had another accident on July 18, 2008, (Docket No. 1,051,270) injuring his right shoulder, after attempting to clear a 50 pound bag from a conveyor. Claimant underwent surgery on his right shoulder on September 29, 2008, under the care of board certified orthopedic surgeon, Bradley T. Poole, M.D. That right shoulder injury has been settled for \$8,000 and is not part of this claim. Claimant testified that while working for CJ Foods, he suffered injuries to both shoulders and his neck. His neck injury has resolved.

At preliminary hearing, claimant's testified the pain in his left shoulder was constant and the more he used the shoulder the worse it hurt. It was worse at night. However, operating a forklift did not bother his shoulder. Claimant believed he has a torn rotator cuff that needed to be repaired and he believed this started from the original accident in March of 2008 while working for CJ Foods. Claimant has had pain in the shoulder ever since.

Sometime in early 2009 claimant suffered another injury to his left shoulder. Claimant was working in the meat room putting 50 pound slabs of meat on a conveyor when he began to notice increased pain in his left shoulder. He began to compensate by using his back more when he was lifting. He testified that his prior job did not require a lot of lifting. Claimant, on his own, sought treatment with Dr. Poole and had surgery on the left shoulder on January 20, 2010. He had two injections in April 2010, one in the left shoulder and one in the low back, both with Dr. Kucera. Claimant was released from treatment with Dr. Poole on April 20, 2010. Claimant was not allowed to return to work for CJ Foods¹, but was able to obtain a job with Fairview Mills, starting there on August 3, 2010.

¹ Claimant's last day of work for CJ Foods was January 7, 2010.

Claimant continues to work for Fairview Mills. He works in the warehouse and spends 90 percent of his time on a forklift and the rest doing paperwork, sweeping the floor, and every now and then throwing around a few bags. The number of bags claimant handles per day varies from 20 to 40.

Claimant began to notice popping in his left shoulder in December 2010 after he began working for Fairview Mills. Claimant returned to Dr. Poole on January 6, 2011, because he thought that, as part of his settlement if he had any other problems, he could receive medical treatment.² He had an MRI of his left shoulder on January 21, 2011, which revealed a tear of the supraspinatus as well as a possible tear of the glenoid labrum. Claimant's visit and MRI were paid for by respondent, but payments ceased when it was recommended that claimant have another surgery. Claimant testified that Dr. Poole told him the problems with the left shoulder were a continuation of his long history of problems. Claimant filed a claim against Fairview Mills on April 20, 2011, claiming a repetitive use injury to the left shoulder.

Claimant experienced spasms and popping in his shoulder between April 2010 and December 2011. Although he noticed it more in December, he didn't consider it to be a new injury at that time.³ Claimant testified that he hasn't been pain free since March 2008. He also testified that his pain increased after his January 2010 surgery.

Claimant's pain has gotten worse since he began working for Fairview Mills in August 2010. Any activity increases the pain in his left shoulder. Claimant testified that when he is working at Fairview Mills his pain level is a 6 out of 10 and goes to an 8 out of 10 when he is lifting.⁴ Claimant testified there has never been a moment where he thought he had a new injury while working for Fairview Mills. He relates all of his problems to his work at CJ Foods. However, claimant also testified his work for Fairview Mills aggravated his injury from CJ Foods.

Claimant was initially examined by orthopedic surgeon, Richard E. Polly, M.D., on April 22, 2008. Claimant had undergone an MRI of the right shoulder on April 8, 2008. That MRI was read by Dr. Poole as normal. Claimant complained of pain below the right elbow with numbness and tingling in the hand. An MRI of the cervical spine was unremarkable, displaying only mild degenerative disc disease. A May 27, 2008, note from Dr. Polly indicated tenderness over claimant's right biceps tendon with a corticosteroid injection recommended. By June 24, 2008, claimant was listed as at MMI for the right shoulder. The left shoulder was listed as not certified by workers compensation. Claimant

² P.H. Trans. (July 11, 2012) at 42.

³ P.H. Trans. (July 11, 2012) at 54-55.

⁴ P.H. Trans. (July 11, 2012) at 58.

was allowed to continue on regular duty. The right shoulder injury was described in a July 22, 2008 note. The medical records indicate that the initial fall in March 2008, injured the right shoulder. But, there is no mention of the left shoulder in that report. The early reports from Dr. Polly and Dr. Poole indicated that claimant initially had difficulty sleeping on his right side after the fall. The right shoulder surgery was performed on September 29, 2008, consisting of a right shoulder partial thickness rotator cuff repair. Claimant was released to light duty, desk work only and restricted to left hand duty.

On February 17, 2009, claimant underwent an MRI of the left shoulder. A tiny incomplete tear in the supraspinatus tendon was diagnosed. No history of injury is contained in the medical reports. By March 31, 2009, claimant was released to work with a 50 pound occasional lift limit, 20 pound frequent and 10 pound constant lift limit on the right side. Claimant missed his April 27, 2009, appointment with Dr. Poole. The next medical note is dated November 23, 2009, and indicates left shoulder issues, with left shoulder surgery indicated. Left shoulder problems are described as having progressed over the last several months. There is still no discussion of a work related connection.

Claimant underwent left shoulder surgery on January 8, 2010, involving debridement of a partial thickness rotator cuff tear and debridement of the anterior superior labrum. Claimant was again restricted to desk work. Claimant remained on limited duty until April 21, 2010, at which time he was returned to regular duty with no restrictions. Dr. Poole released claimant with instructions to return on a prn basis. As noted above, claimant was unable to return to work for respondent CJ Foods, but did obtain employment with Fairview Mills on August 3, 2010.

Claimant was referred by respondent to board certified orthopedic surgeon Lowry Jones, Jr., M.D. on March 24, 2011. Dr. Jones was provided with extensive medical records on claimant, dealing with his ongoing left shoulder complaints. The history indicates claimant injured both shoulders and his neck from the March 2008 fall. Claimant detailed the right shoulder treatment and indicated his left shoulder problems continued to get worse. Dr. Jones questioned claimant about his current job with Fairview Mills. Claimant stated that "he did not want to blame his new job as he was concerned about possibly losing his job."⁵ A January 21, 2011 MRI showed a partial tear of the superficial or extraarticular fibers of the rotator cuff. Dr. Jones noted the more recent MRI showed changes from the MRI done on February 18, 2009. He opined that claimant suffered an initial left shoulder injury in March 2008, with a later aggravation and a subsequent surgery. However after his release, claimant obtained employment in a new job requiring repetitive lifting. In Dr. Jones opinion, claimant suffered some progression of the disease process related to the work for Fairview Mills and not from his job at CJ Foods. Additional medical treatment as recommended by Dr. Poole was acknowledged.

⁵ P.H. Trans. (July 11, 2012), Resp. Ex. A at 9 (Dr. Jones' Mar. 24, 2011 report).

Claimant was referred by respondent CJ Foods and its insurance carrier Liberty Mutual, to board certified orthopedic surgeon Thomas V. DiStefano, M.D., on September 22, 2011. This was Dr. DiStefano's second examination of claimant, having seen him on March 22, 2009. Claimant described the fall in March 2008, with injuries to both shoulders and his neck. However, Dr. DiStefano also discusses a later accident on July 18, 2008, but fails to differentiate between claimant's left shoulder and the right shoulder injury when discussing the July 2008 injuries. The history provided to Dr. DiStefano also describes claimant's work with Fairview Mills and the increased pain and weakness associated with that job. Dr. DiStefano ultimately determined that claimant's ongoing left shoulder problems are not the result of his work for Fairview Mills, but are instead, the result of claimant's second described injury on July 18, 2008. As noted above, the July 18, 2008, injury was to claimant's right shoulder, not the left shoulder. There is no indication of a left shoulder aggravation from that accident.

On November 23, 2011, Dr. Jones provided a subsequent report regarding claimant's ongoing shoulder complaints and the cause of those complaints. He noted the confusion associated with Dr. DiStefano's opinion. Dr. Jones reiterated that claimant suffered bilateral shoulder injuries in March 2008, with both shoulders being aggravated by a later injury. The left shoulder was injured in March 2008, but was also later aggravated by claimant's new job with Fairview Mills.

At the request of respondent CJ Foods and its insurance carrier Liberty Mutual, claimant met with board certified orthopedic surgeon Daniel J. Stechschulte, M.D., on January 27, 2012. The history provided to Dr. Stechschulte describes the March 2008 accident to his shoulders. Claimant was diagnosed with a full thickness tear of the supraspinatus and a labral tear in the left shoulder. Dr. Stechschulte determined that the injuries suffered by claimant while with CJ Foods were not the primary or prevailing cause of claimant's current left shoulder complaints. Dr. Stechschulte felt claimant was at MMI for those injuries.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁶

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁷

⁶ K.S.A. 44-501 and K.S.A. 44-508(g).

⁷ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁸

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁹

In general, the question of whether the worsening of a claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether the claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.¹⁰

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.¹¹

The ALJ determined that, even though claimant had suffered work-related injuries while working for CJ Foods, he further aggravated his left shoulder while working for Fairview Mills. This Board Member agrees. It is clear that claimant was reluctant to file a new claim against his current employer. However claimant was fairly specific regarding the worsening of his shoulder condition while performing the work for Fairview Mills. Additionally, the MRIs performed before and after claimant's job change display a worsening of the left shoulder condition. This Board Member finds that claimant aggravated his left shoulder condition while performing work for Fairview Mills and the Order of the ALJ granting medical treatment against Fairview Mills and its insurance carrier Wausau is affirmed. The ALJ did not exceed her jurisdiction in granting the medical benefits for claimant's left shoulder.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this

⁸ K.S.A. 44-501(a).

⁹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

¹⁰ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

¹¹ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

¹² K.S.A. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered personal injury by accident which arose out of and in the course of his employment with Fairview Mills. The award of medical benefits against Fairview Mills and Wausau is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated July 13, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
janet@ksjustice.com

Karl L. Wenger, Attorney for Fairview Mills, Inc. and Wausau Business Ins. Co.
kwenger@mvplaw.com
mvpkc@mvplaw.com

Heather Howard, Attorney for CJ Foods and Liberty Mutual Ins. Co.
heather.howard@libertymutual.com

Timothy Lutz, Attorney for CJ Foods and General Casualty Ins. Co.
tlutz@wallacesaunders.com

Rebecca Sanders, Administrative Law Judge